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VETO—S. 2104

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RETURNING

WITHOUT MY APPROVAL S. 2104, THE CIVIL RIGHTS ACT OF 1990

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To the Senate of the United States:

I am today returning without my approval S. 2104, the "Civil Rights Act of 1990." I deeply regret having to take this action with respect to a bill bearing such a title, especially since it contains certain provisions that I strongly endorse.

Discrimination, whether on the basis of race, national origin, sex, religion, or disability, is worse than wrong. It is a fundamental evil that tears at the fabric of our society, and one that all Americans should and must oppose. That requires rigorous enforcement of existing antidiscrimination laws. It also requires vigorously promoting new measures such as this year's Americans with Disabilities Act, which for the first time adequately protects persons with disabilities against invidious discrimination.

One step that the Congress can take to fight discrimination right now is to act promptly on the civil rights bill that I transmitted on October 20, 1990. This accomplishes the stated purpose of S. 2104 in strengthening our Nation's laws against employment discrimination. Indeed, this bill contains several important provisions that are similar to provisions in S. 2104:

Both shift the burden of proof to the employer on the issue of "business necessity" in disparate impact cases.

Both create expanded protections against on-the-job racial discrimination by extending 42 U.S.C. 1981 to the performance as well as the making of contracts.

Both expand the right to challenge discriminatory seniority systems by providing that suit may be brought when they cause harm to plaintiffs.

Both have provisions creating new monetary remedies for the victims of practices such as sexual harassment. (The Administration bill allows equitable awards up to $150,000.00 under this new monetary provision, in addition to existing remedies under Title VII.)

Both have provisions ensuring that employers can be held liable if invidious discrimination was a motivating factor in an employment decision.

Both provide for plaintiffs in civil rights cases to receive expert witness fees under the same standards that apply to attorneys fees.

Both provide that the Federal Government, when it is a defendant under Title VII, will have the same obligation to pay interest to compensate for delay in payment as a nonpublic party. The filing period in such actions is also lengthened.

Both contain a provision encouraging the use of alternative dispute resolution mechanisms.

The congressional majority and I are on common ground regarding these important provisions. Disputes about other, controversial pro-

visions in S. 2104 should not be allowed to impede the enactment of these proposals.

Along with the significant similarities between my Administration's bill and S. 2104, however, there are crucial differences. Despite the use of the term "civil rights" in the title of S. 2104, the bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system. Primarily through provisions governing cases in which employment practices are alleged to have *unintentionally* caused the disproportionate exclusion of members of certain groups, S. 2104 creates powerful incentives for employers to adopt hiring and promotion quotas. These incentives are created by the bill's new and very technical rules of litigation, which will make it difficult for employers to defend legitimate employment practices. In many cases, a defense against unfounded allegations will be impossible. Among other problems, the plaintiff often need not even show that any of the employer's practices caused a significant statistical disparity. In other cases, the employer's defense is confined to an unduly narrow definition of "business necessity" that is significantly more restrictive than that established by the Supreme Court in *Griggs* and in two decades of subsequent decisions. Thus, unable to defend legitimate practices in court, employers will be driven to adopt quotas in order to avoid liability.

Proponents of S. 2104 assert that it is needed to overturn the Supreme Court's *Wards Cove* decision and restore the law that had existed since the *Griggs* case in 1971. S. 2104, however, does not in fact codify *Griggs* or the Court's subsequent decisions prior to *Wards Cove*. Instead, S. 2104 engages in a sweeping rewrite of two decades of Supreme Court jurisprudence, using language that appears in no decision of the Court and that is contrary to principles acknowledged even by Justice Stevens' *dissent* in *Wards Cove*: "The opinion in *Griggs* made it clear that a neutral practice that operates to exclude minorities is nevertheless lawful if it serves a valid business purpose."

I am aware of the dispute among lawyers about the proper interpretation of certain critical language used in this portion of S. 2104. The very fact of this dispute suggests that the bill is not codifying the law developed by the Supreme Court in *Griggs* and subsequent cases. This debate, moreover, is a sure sign that S. 2104 will lead to years—perhaps decades—of uncertainty and expensive litigation. It is neither fair nor sensible to give the employers of our country a difficult choice between using quotas and seeking a clarification of the law through costly and very risky litigation.

S. 2104 contains several other unacceptable provisions as well. One section unfairly closes the courts, in many instances, to individuals victimized by agreements, to which they were not a party, involving the use of quotas. Another section radically alters the remedial provisions in Title VII of the Civil Rights Act of 1964, replacing measures designed to foster conciliation and settlement with a new scheme modeled on a tort system widely acknowledged to be in a state of crisis. The bill also contains a number of provisions that will create unnecessary and inappropriate incentives for litigation. These include unfair retroactivity rules; attorneys fee provisions that will discourage settlements; unreasonable new stat-

utes of limitation; and a "rule of construction" that will make it extremely difficult to know how courts can be expected to apply the law. In order to assist the Congress regarding legislation in this area, I enclose herewith a memorandum from the Attorney General explaining in detail the defects that make S. 2104 unacceptable.

Our goal and our promise has been equal opportunity and equal protection under the law. That is a bedrock principle from which we cannot retreat. The temptation to support a bill—any bill—simply because its title includes the words "civil rights" is very strong. This impulse is not entirely bad. Presumptions have too often run the other way, and our Nation's history on racial questions cautions against complacency. But when our efforts, however well intentioned, result in quotas, equal opportunity is not advanced but thwarted. The very commitment to justice and equality that is offered as the reason why this bill should be signed requires me to veto it.

Again, I urge the Congress to act on my legislation before adjournment. In order truly to enhance equal opportunity, however, the Congress must also take action in several related areas. The elimination of employment discrimination is a vital element in achieving the American dream, but it is not enough. The absence of discrimination will have little concrete meaning unless jobs are available and the members of all groups have the skills and education needed to qualify for those jobs. Nor can we expect that our young people will work hard to prepare for the future if they grow up in a climate of violence, drugs, and hopelessness.

In order to address these problems, attention must be given to measures that promote accountability, and parental choice in the schools; that strengthen the fight against violent criminals and drug dealers in our inner cities; and that help combat poverty and inadequate housing. We need initiatives that will empower individual Americans and enable them to reclaim control of their lives, thus helping to make our country's promise of opportunity a reality for all. Enactment of such initiatives, along with my Administration's civil rights bill, will achieve real advances for the cause of equal opportunity.

GEORGE BUSH.

THE WHITE HOUSE, *October 22, 1990.*

[MEMORANDUM FOR THE PRESIDENT]

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, October 22, 1990.

S. 2104, THE CIVIL RIGHTS ACT OF 1990

This memorandum sets forth my views, and those of the Department of Justice, on S. 2104, the "Civil Rights Act of 1990." Although the bill contains some provisions that we both would like to see become law, S. 2104 is fatally flawed.

On May 17, 1990, in a Rose Garden speech marking the reauthorization of the Civil Rights Commission, you outlined the principles that would guide the approach of your Administration to civil rights legislation. You stated that: (1) civil rights legislation must

operate to obliterate consideration of factors such as race and sex from employment decisions; (2) it must reflect fundamental principles of fairness that apply throughout our legal system; and (3) it should strengthen deterrents against harassment in the workplace based on race, sex, religion, or disability, but should not produce a new and unjustified lawyers' bonanza.

S. 2104 is not consistent with these principles. It creates powerful incentives for employers to adopt quotas in order to avoid litigation. It shields discriminatory consent decrees from legal challenge under many circumstances. And it contains several provisions that will serve primarily to foster litigation rather than conciliation and mediation.

I. INCENTIVES FOR EMPLOYERS TO ADOPT QUOTAS

Sections 3 and 4 of S. 2104 create strong incentives for employers to adopt quotas. Although putatively needed to "restore" the law that existed before the Supreme Court's opinion in *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115 (1989), these sections actually engage in a sweeping rewrite of the law of employment discrimination.

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits hiring and promotion practices that unintentionally but disproportionately exclude persons of a particular race, sex, ethnicity, or religion unless these practices are justified by business necessity. Law suits challenging such practices are called "disparate impact" cases, in contrast to "disparate treatment" cases brought to challenge intentional discrimination.

In a series of cases decided in subsequent years, the Supreme Court refined and clarified the doctrine of disparate impact. In 1988, the Court greatly expanded the scope of the doctrine's coverage by applying it to subjective hiring and promotion practices (the Court had previously applied it only in cases involving objective criteria like diploma requirements and height-and-weight requirements). Justice O'Connor took this occasion to explain with great care both the reasons for the expansion and the need to be clear about the evidentiary standards that would operate to prevent the expansion of disparate impact doctrine from leading to quotas. In the course of her discussion, she pointed out:

> [T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. . . . [E]xtending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. *Watson* v. *Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2787–2788 (1988) (plurality opinion).

The following year, in *Wards Cove*, the Court considered whether the plaintiff or the defendant had the burden of proof on the issue of business necessity. Resolving an ambiguity in the prior law, the Court placed the burden on the plaintiff. Supporters of S. 2104 argue that this rule imposes an unreasonable burden on employees, and have claimed that legislation is needed to redress this imbalance. As you know, your Administration is prepared to accept the shifting of that burden to the defendant.

Sections 3 and 4 of S. 2104, however, go far beyond this shift in the burden of proof. First, the bill effectively creates a new presumption of discrimination whenever a plaintiff shows a sufficient statistical disparity in the racial, sexual, ethnic, or religious makeup of an employer's workforce, even if the plaintiff fails to identify any employment practice that has caused the disparity. Second, it defines "business necessity" in an unduly restrictive way. Finally, it imposes unreasonable restrictions on the type of evidence an employer may use in proving business necessity. In combination, these provisions will force employers to choose between (1) lengthy litigation, under rules rigged heavily against them, or (2) adopting policies that ensure that their numbers come out "right." Put another way, the bill exerts strong pressure on employers to adopt surreptitious quotas.

A. The presumption of discrimination arising from statistical disparities

Under Section 4, a plaintiff may bring a disparate impact case by alleging that a "group of employment practices results in" significant statistical disparity. "Group of employment practices" is very broadly defined in Section 3 to include any "combination of employment practices that produces one or more decisions with respect to employment . . ."

That definition provides no limitation whatsoever: *all* practices that combine to produce, say, hiring decisions—for example, use of a high school graduation requirement, plus an interview, plus job references, plus a requirement of a clean criminal record—all could be lumped together as a single "group." Thus, if an employer's bottom line numbers are "wrong," the employer can be forced to prove that *every* practice is required by "business necessity."

Section 4 includes language emphasizing this point. Subsection (k)(1)(B)(i) states that "except as provided in clause (iii), if a complaining party demonstrates that a group of employment practices results in a disparate impact, such party *shall not* be required to demonstrate which specific practice or practices within the group results in such disparate impact" (emphasis added). The exception in clause (iii) seems at first to state the opposite, but actually takes away what it seems to give. Specificity is not required where the defendant has "failed to keep such records" as are "necessary to make [the] showing" of specifically which "practice or practices are responsible for the disparate impact."

Thus, the bill requires any employer whose workforce has the "wrong" bottom line numbers to point to records showing that one of its practices could have been challenged as "responsible for" the disparate impact. This is not a mere recordkeeping requirement: it is essentially a transfer from the plaintiff to the defendant of the

obligation to make out the bulk of the plaintiff's prima facie case. The transfer of obligations is merely disguised as a recordkeeping requirement. An employer who cannot meet the burden created by this rule faces the prospect of defending *all* of its employment practices under the business necessity test.

This concealed obligation does not merely create all the recordkeeping burdens one would imagine, but also a classic Catch-22: if an imbalance in the employer's workforce is caused by something other than the employer's practices (by housing patterns, for example), so that the employer could not *possibly* have kept records showing which of its practices were responsible for the imbalance (because none was), a prima facie case will nevertheless be deemed to have been established because the group of practices "results in" a disparate impact and the employer cannot possibly explain it from his own records.

The notion of allowing plaintiffs to attack a "group of practices" without showing that each member of the group has caused a disparate impact has absolutely no basis in Supreme Court precedent. All Supreme Court cases prior to *Wards Cove* focused on the impact of *particular* hiring practices, and plaintiffs have always targeted those specific practices. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979); *Connecticut* v. *Teal*, 457 U.S. 440 (1982); *Watson* v. *Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777 (1988). The new rule created in S. 2104 is inconsistent with a fundamental principle of civil litigation: that the plaintiff is obliged to identify what act of the defendant is responsible for the plaintiff's injury. Even apart from other defects in Sections 3 and 4 of this bill, the treatment of "groups of practices" creates extremely powerful incentives for employers to adopt quotas rather than go through the litigation necessary to establish the "business necessity" of every one of their employment practices.

B. The business necessity definition and the evidentiary restrictions

The risk of surreptitious quotas created by the bill's provisions on "groups of practices" is compounded by S. 2104's unreasonably restrictive definition of "business necessity" and by evidentiary restrictions imposed on employers trying to meet the "business necessity" test. I will discuss each in turn.

1. The business necessity definition

S. 2104 forces employers to defend any employment practice "involving selection" by showing a "significant relationship to successful performance of the job." This standard is new; it is found nowhere in any holding of the Supreme Court. On its face, it is defective because a narrow requirement of this type denies that there can be legitimate and desirable selection or promotion practices aimed at objectives other than successful job performance. Moreover, its very novelty guarantees that it will generate litigation for employers seeking to defend themselves. Finally, the bill's peculiar treatment of prior cases is likely to suggest to courts that ambiguities should be resolved against employers. In combination, these defects again make it likely that employers will adopt quotas

rather than risk expensive litigation whose outcome will be highly uncertain.

First, simply taking the definition literally, S. 2104 would preclude employers from using hiring or promotion practices serving many legitimate business objectives. Consider, for example, an employer with a policy under which promotions are given only to employees who receive "outstanding" ratings in their current jobs. The justification for such a policy might be that it provides an incentive for all employees to perform in an outstanding manner, thereby promoting overall efficiency within the firm. Under S. 2104, however, the employer could not rely on that justification. Rather, he or she would have to attempt to prove that outstanding performance in an employee's current job was "significant[ly] relat[ed] to successful performance" of the next job. In many cases, this might be impossible.

There is no sound policy reason for confining in this way the justifications an employer may offer for its selection practices. Nor were such restrictions required by Supreme Court decisions prior to *Wards Cove*. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); *Watson* v. *Fort Worth Bank & Trust Co.* 108 S. Ct. 2777, 2790 (1988) (plurality opinion). Indeed, the *Wards Cove* dissent itself made clear that under *Griggs* any "valid business purpose" would suffice. *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2129 (1989) (Stevens, J., dissenting).

The statement in S. 2104 that the definition of business necessity is intended to codify *Griggs* cannot alter the inconsistency between the bill's text and the language of *Griggs*, or the inconsistency between the bill's text and almost two decades of Supreme Court precedent interpreting *Griggs*. Instead, it merely guarantees confusion as courts attempt to sort out precisely what Congress had in mind. This confusion will be time-consuming and very expensive. And it will bring no benefit to the victims of discrimination.

Finally, in attempting to interpret the confusing definition of "business necessity," some courts would likely come to the conclusion that Congress intended to bring about certain highly undesirable results. First, the bill states that it is designed to overrule *Wards Cove*'s "treatment of business necessity as a defense." Part of that treatment of business necessity, though, was the Court's rejection of the view that an employer is required to show that the "challenged practice [is] 'essential' or 'indispensable' to the employer's business." *Wards Cove Packing Co.* v. *Atonio*, 109 S. Ct. 2115, 2126 (1989). As the Supreme Court noted, "this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils," including quotas. *Id.* Rather, the Court quite reasonably found that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Id.* at 2125–2126 (citing *Watson* and *Beazer* as well as *Griggs*). On this issue, as pointed out above, the dissent in *Wards Cove* is in agreement.

In light of these statements, a statutory provision overruling "the treatment of business necessity" in *Wards Cove* could reasonably be interpreted by many courts as returning the bill's definition of business necessity to the widely criticized standard included

in the original incarnation of S. 2104 ("essential to effective job performance"). This inference would be strengthened by two other provisions of the bill: Section 2 ("Findings and Purposes") and Section 11 ("Construction"). Working in tandem, Sections 2 and 11 would likely lead some courts to resolve ambiguities in the bill against prior decisions by the Supreme Court and against defendants.

2. Evidentiary restrictions

Finally, employers who must attempt to meet the business necessity test must do so by means of "demonstrable evidence." This is a new term invented by the bill, and no definition is provided. The bill contains a long list of types of evidence that courts may "receive," but the bill does not say that any of these necessarily constitutes "demonstrable evidence." Courts will likely understand the use of this new term (particularly in light of Sections 2 and 11 of the bill) to mean that Congress is referring to some category of evidence that is narrower than the category of evidence on which courts would otherwise rely. The effect of this provision, then will apparently be to indirectly raise the burden of proof on the defendant beyond what it would otherwise be.

I am not aware that any justification has been offered for restricting the kind of evidence on which courts may rely in this context. Nor do I believe that it is advisable to force the courts to engage in guessing games about the meaning of a novel term like "demonstrable evidence." As with several other aspects of Sections 3 and 4 of S. 2104, this provision will cause uncertainty among attorneys who must advise employers about the meaning of the law, and it will cause confusion in the courts. No good purpose will be served, and a great deal of pointless expense will be imposed on those who must live under this new legislation.

C. Conclusion

So far as I am aware, there is no reported judicial decision indicating any need for a legislative modification of the manner in which the courts handle "group[s] of employment practices" under disparate impact theory. The rule created in S. 2104, moreover, is contrary to fundamental principles of civil litigation, and it is likely to lead in practice to unjust results.

There is no sound policy reason for the imposition of artificial restrictions of the kind created by S. 2104 on the justifications that employers may offer for legitimate employment practices. Similarly, there is no sound policy reason for imposing on defendants evidentiary restrictions that exist nowhere else in the law and that are not even clearly spelled out in the proposed statute.

The effect of these proposed changes in the law is clear: these provisions, if they are enacted, would exert strong pressure on employers to avoid having to defend their employment practices; the only practicable way for employers to do this would be to avoid the statistical disparities that would require them to mount such a defense. In short, many employers will see no real alternative to adopting quotas.

II. FUNDAMENTAL FAIRNESS AND THE INSULATION OF QUOTAS FROM LEGAL CHALLENGE

The bill in its current form also promotes quotas through its treatment of discriminatory consent decrees. It does this by totally denying certain individuals access to the courts to challenge illegal agreements—in which these individuals had no part—prescribing quotas that exclude them from employment opportunities.

Section 6 of S. 2104 would overrule the Supreme Court's decision in *Martin* v. *Wilks*, 109 S. Ct. 2180 (1989). That case arose in the context of a civil rights action, but it turned on principles of fairness and access to court that apply in every situation. The Court held that white firefighters who had not been parties to a consent decree that mandated racial preferences could have their day in court to contend that the decree violated their civil rights.

Section 6 would in many circumstances cut off this right and deny some persons, who were never notified of these decrees and had no chance to challenge them, their right to sue. For example, a plaintiff denied a promotion as a result of a discriminatory consent decree in place ten years before the plaintiff was hired would in some circumstances be precluded by Section 6 from challenging the decree.

At the outset, it must be stressed that only certain settlements or consent decrees can be successfully challenged after *Martin* v. *Wilks:* those containing provisions that violate an innocent third party's rights under Title VII or the Fourteenth Amendment. The only justification offered for this provision is the systemic interest in the finality of judicial resolution of disputes. But while that interest is important, it should not be pursued at the cost of the requirement of fundamental fairness that underlies our judicial system, in which individuals are traditionally guaranteed a meaningful opportunity to assert their interests in court before they are bound by judicial action.

Moreover, the concern at which Section 6 is assertedly directed, *viz.* the fear of repeated challenges to the same decree, is largely chimerical. Existing legal doctrines are already adequate to head off nonmeritorious challenges to decrees. The doctrines of law of the case, res judicata, and stare decisis will allow courts to deal with them summarily at little expense in time or money to the parties. In addition, the rules or joinder make it relatively easy for parties to ensure that affected people have their day in court in the original action. The threat of an award of attorney fees against the losing party who brings a frivolous suit is a further deterrent to such challenges.

The bill's treatment of discriminatory seniority systems is in stark contrast with its treatment of discriminatory consent decrees. In dealing with seniority systems, Section 7(b) of the bill appropriately corrects a defect in current law by allowing a plaintiff to challenge a discriminatory seniority system or practice at the time it is applied to the plaintiff. Current law requires the challenge to be made at the time of the adoption of the seniority system. Consistent with the view taken by your Administration, proponents of S. 2104 have rightly argued that this is unreasonable and should be corrected by legislation.

So far as I am aware, S. 2104's sponsors have given no explanation for this inconsistency between Sections 6 and 7(b) of their bill. The effect of it, however, is quite clear: unlike seniority systems, consent decrees have frequently contained provisions establishing hiring and promotion quotas or racial preferences. Section 6 prevents legal challenges to such provisions. Thus, far from enhancing civil rights, Section 6 severely abridges them.

Section 9 contains a provision complementing the provisions in Section 6. For the first time, Title VII would say that certain civil rights plaintiffs—those challenging the legality of quotas adopted under a consent decree—could be required to pay attorneys fees where their lawsuit was neither frivolous nor otherwise unreasonable. The clear effect would be to discourage many challenges to illegal discrimination. The creation of fundamentally unfair obstacles to the vindication of our citizens' civil rights has no place in a civil rights bill.

Proponents of S. 2104 argue that Section 13 of the bill, which states that nothing in the bill "shall be construed to require or encourage an employer to adopt hiring or promotion quotas," is a sufficient answer to the concerns raised here and in part I of this memorandum. In fact, however, Section 13 is entirely unresponsive to them. The problem with Sections 3 and 4 is not that they directly require or encourage quotas, but rather that employers will in fact choose to adopt quotas in order to avoid having to defend their hiring practices under the unreasonable litigation rules established by the bill. And the problem with Section 6 is not that it requires quotas, but that it insulates them from challenge. In fact, in its present form, Section 13 has an exception from the anti-quota language (and from all other provisions in the bill) for quotas that might be contained in some court-ordered remedies, affirmative action plans, or conciliation agreements.

III. EXPANSION OF REMEDIES UNDER TITLE VII AND PROVISIONS AFFECTING THE INCENTIVES FOR LITIGATION

Section 8 of S. 2104 radically alters the Civil Rights Act of 1964 by making available unlimited compensatory damages, as well as punitive damages and jury trials, in most cases under Title VII.

As you noted in your May 17 speech, federal law should provide an adequate deterrent against harassment in the workplace, and additional remedies are needed to accomplish this goal. Although S. 2104 imposes a partial cap on punitive damages, thereby setting an important precedent in the area of federal tort remedies, the expansion of remedies contained in Section 8 is excessive. Section 8 is not confined to filling the gap where existing remedies are inadequate, such as in many cases of sexual harassment. Rather, it imports into our employment discrimination laws the entire panoply of tort remedies, punitive damages, and jury trials, which runs counter to the concepts of mediation and conciliation upon which Title VII is based. This will create unnecessary and counterproductive litigation, serving the interests of lawyers far more than the interests of aggrieved employees.

Other provisions in S. 2104 will also contribute unnecessarily to fostering litigation instead of conciliation. An amendment to 42

U.S.C. 2000e–5(k), for example, permits plaintiffs to recover attorneys fees for continuing to litigate even if the judgment they ultimately obtain is less favorable than a settlement offer they rejected. Similarly, a new paragraph (2) in 42 U.S.C. 200e–5k creates special rules impeding waiver of attorney's fees as part of settlement, which will inevitably discourage settlements because defendants will not be able to estimate accurately the total cost of the settlement to which they are being asked to agree.

Several other provisions of this bill have little to do with promoting civil rights. Rather, they seem principally designed to give plaintiffs special and unwarranted litigation advantages. Section 7(a) gives plaintiffs 2 years, rather than 180 days (or, in certain cases, 300 days), to file discrimination claims. Section 11 creates a special legislative rule of construction for civil rights cases that seems intended to encourage courts to resolve cases in favor of plaintiffs whenever possible. And Section 15 unfairly applies the changes in the law made by S. 2104 to cases already decided.

IV. CONCLUSION

S. 2104, in the form in which it has been presented to you, is seriously flawed. While it contains certain desirable provisions, these sections are greatly outweighed by the portions of the bill that are objectionable in the particulars specified above. Taken as a whole, S. 2104 would do far more to disrupt our legal system and to disappoint the legitimate expectations of our citizens for equal opportunity than it would to advance the goal, to which you and I are both committed, of strengthening the laws against employment discrimination.

DICK THORNBURGH,
Attorney General.

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